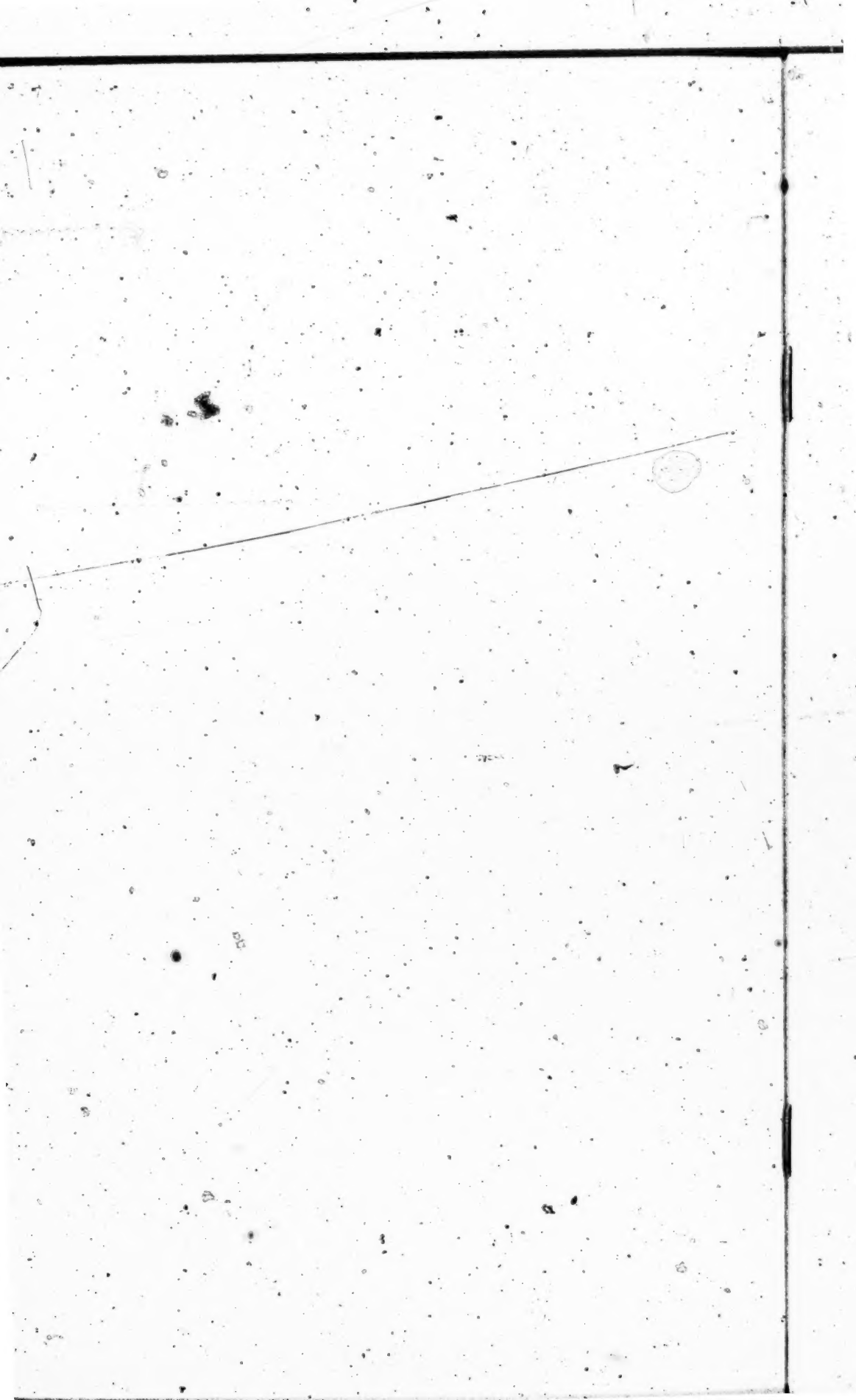

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 562

ROBERT PUENTES,

Appellant,

v.

THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 21, TOWN OF BETHPAGE, NASSAU COUNTY, NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

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249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves to dismiss on the grounds that the question is so unsubstantial as not to need further argument.

Questions Presented

1. Is a public employer absolutely restrained from disciplining its employees for utterances directed against the

employer—despite the detrimental effects of those utterances—unless it is found that they were made with "actual malice" as defined in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280, 80 S. Ct. 710, 11 L. Ed. 2d 686 (1964)? or

2. Is the public employee to be disciplined only in those cases where it is shown by substantial evidence that the utterances were calculated to and did work substantial injury to his employer even though they might not be such as would entitle the employer to seek damages for defamation?

Statement of the Case

The appellant is a teacher in the Bethpage Public Schools. On June 18, 1963, during and before school hours, he caused to be distributed among the Bethpage faculty, administrators and school board the letter set forth in appellant's Jurisdictional Statement (pp. 7-9). As a result of the distribution of the letter and appellant's subsequent refusal to answer questions about it put to him by the Superintendent of Schools, charges were preferred against appellant. A trial was held before the School Board. The appellant was found guilty on all charges (except one which was withdrawn at the outset of the trial). A penalty of suspension, without pay, for a period of seven and one-half months was imposed and the appellant was further ordered to desist in the future from activities similar to those complained of in the charges (Appellant's App. pp. 12-42).

There were two charges. The first (Misconduct) was that appellant wrote and distributed the letter containing accusations against the Board, the Superintendent and one of the Principals of an elementary school, which letter was designed to hold the administrators of education in the District up to contempt and ridicule, and to create suspicion, dissension and disharmony among the Board, the Administration and the Faculty of the District.

The second charge (Insubordination) was that when questioned by the Superintendent concerning his activities in connection with the writing and distribution of the letter, the appellant refused to answer without the advice of counsel. It was further charged that the writing and distribution of the letter which formed the basis of the first charge constituted insubordination against the Administration and the Board of Education, in that they constituted and encouraged a defiance and contempt of the authority of these bodies and were contumacious in character.

The letter states that it is being written to obtain justice for a probationary teacher in the third grade of an elementary school—a Miss Coelho—whose employment for the following year has not been recommended by the principal of her school. It describes Miss Coelho as the victim of the principal's whim and states that contemptible political considerations and questionable administrative practices in this District outweigh Miss Coelho's obvious merits. The letter goes on to allege that this painfully evident discrimination and injustice has so increased the skepticism of the faculty whose respect for the procedures of the District is already dangerously low, that the action is hypocritically sought to be justified by shabby excuses which are simply sham, jargon or juggled statistics.

Both the original letter and the mimeographed copy distributed to the Faculty and the Administration were introduced as exhibits, and are discussed in detail in the Board's decision (Appellant's App. p. 12). That the statements were defamatory and were made recklessly, with no genuine concern for the facts surrounding the Coelho matter, is evident from a reading of the letter.

The circulation of this letter was not only intended to, but did discredit, harass and interfere with the administration of the school system in the District. To minimize, as far as possible, the damage to education, amounting substantially to a public scandal, the Board not only was justi-

fied in suspending the appellant, but under all the circumstances, could properly have dismissed him instead of merely suspending him for a short term.

Even the appellant seems to have realized how serious an effect the letter would be likely to have. Though he personally gathered the data for it, composed it and distributed it, he took various evasive measures to conceal or becloud his personal responsibility, such as writing it on the stationery of a labor union, stating under his signature that he was the president of the Union, equivocating on his personal distribution of the letter (some of the letters were sent in the inter-school mail system), refusing to answer the Superintendent's lawful questions about it without advice of counsel, and the like.

That the injury to the School District and its administrators was intended and deliberate and was wanton, and malicious, is readily apparent if the chronology of the events leading up to the writing and circulation of the letter is considered.

The appellant, at all times was the president of a Union known as Bethpage Federation of Teachers. This Union was substantially a paper organization, keeping no record of its meetings or proceedings and with no accurate membership list. It was not recognized by the School Board, and carried on no negotiations of any kind with the School District. How many members it had does not appear, but Miss Coelho was not a member, and prior at least to June 5, 1963 was unknown to the appellant and to most, if not all of the other members.

Miss Coelho was a probationary teacher in the third elementary grade of the Pine Avenue School. Her teaching experience had been in India and England, and her methods were influenced by this previous training. The principal of this school early in 1963, after numerous evaluation and observation reports on Miss Coelho's classroom teaching,

had come to the conclusion that the rote and memorization methods employed almost exclusively by Miss Coelho were at serious variance with the educational philosophy of the District, which guided the other teachers.

The Principal, Mrs. Rockhill, stated that she gave Miss Coelho more opportunity to conform her teaching methods to the methods employed by the Bethpage School District, than she would to the ordinary probationary School Teacher, but Miss Coelho could not or would not conform.

—May 16, 1963—Miss Coelho, pursuant to her application, was accepted as a teacher for the coming year in the Jericho School District.

—May 21, 1963—Miss Coelho, wrote to the Superintendent of the Bethpage District declining re-appointment because she had accepted the appointment in Jericho.

—May 28, 1963—Superintendent replies, advising that her resignation has been accepted as of June 30th.

—June 4, 1963—A Mrs. Vredenburgh calls Mr. Puentes to ask him to meet with Miss Coelho on June 7th (A121).* This is the *first* time appellant has heard of Miss Coelho.

—June 5, 1963—A meeting of the Union at which 15 members were present. Appellant spoke about Miss Coelho. The meeting authorized the Executive Committee, of which the appellant was one of the five members, to go ahead and look into the matter and take what action was necessary (A110).

—June 7, 1963—Appellant has first meeting with Miss Coelho.

—June 12, 1963—Mr. Wright, another member of the Executive Committee meets with appellant (A111) and

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* The symbol "A" refers to the pagination contained in the appendix to Petitioner-Appellant's brief to the New York Court of Appeals which is part of the designated record herein.

gives him authorization to write and distribute the letter (A112).

—June 18, 1963—The letter and mimeographed copies are distributed.

On that state of facts, it is apparent (and it must have been apparent to the appellant) that the letter of June 18th would be of no help in gaining for Miss Coelho a renewal of her contract with the Bethpage School District for another year, since she had already accepted employment on May 16, 1963 at the Jericho School District.

The real and only possible purpose of the letter was to use sympathy for Miss Coelho as support for charging appellant's employer with "sham, jargon, juggled statistics, hypocrisy"; with using shabby excuses for contemptible political reasons to perpetuate a glaring wrong on a probationary teacher and thus, allegedly, increase the skepticism of the rest of a faculty, whose respect for the procedures of the District was already dangerously low. The Board's conclusion that "these accusations would tend to create disharmony, dissension and suspicion among the Faculty, the Administrators and the Board of Education inimical to the process of good education in this District" is clearly substantiated by the record. The language of the letter fairly supports much harsher characterization of its intent and probable effect than that found by the Board.

In his Jurisdictional Statement and at the hearing, appellant claims that even if the letter is intemperate, false or malicious, its writing and distribution cannot be misconduct or insubordination on his part, no matter what the effect on the discipline, morale or efficiency of the school, because his right to criticize or complain on matters relating to conditions and betterment of public employment are protected by the First and Fourteenth Amendments to the Constitution of the United States.

This view was specifically rejected by each and every justice and judge in the Appellate Division and the Court of Appeals. The majority in each Court found that there was "substantial evidence" to support the verdict. The minority—represented by Justice Rabin's dissent (Appellant's App., p. 9) apparently felt that, in light of the freedom conferred by the First Amendment, more explicit proof of injury must be required by the courts before it can be said that the verdict is supported by "substantial evidence".

Argument

1. The appellant has advanced a novel argument to support his contention that he has been deprived of a right under the First and Fourteenth Amendments to the United States Constitution. While admitting that a public employee may be disciplined for utterances directed against his employer, he contends that the penalty may be invoked only if the utterances (a) wreak substantial injury and (b) are made with "actual malice." Injury, no matter how substantial, is not enough. The employee also must either know the statements are false or be so reckless as to totally disregard whether they are true or false.

We have only to consider the consequences of applying such a rule of law to all disciplinary hearings to see how unsubstantial is the question presented. Had the statements made by the appellant been part of a speech which incited others to riot, we might be faced with the anomaly of having sufficient evidence to convict the employee of a crime but, on the same set of facts, lack sufficient evidence to discipline him as an employee.

Examples such as this could be found in any form of employment, whether it be public or private. Suppose, if you will, that the Chief Clerk of this Court should tell the newspapers that one of the Justices personally believes

that almost anyone who refuses to sign a "loyalty oath" is a Communist. Whether the statement was true or the Clerk only reasonably believed it to be true, whether the personal beliefs of the Justice in any way affected his decisions in loyalty oath cases, are questions which might never be resolved—since they involve subjective considerations. One thing, though is certain. The injury to the prestige of the Court would be severe. Yet it is the appellant's view that since the Justice may not sue the clerk for libel, the Court may not discipline the Clerk for his remarks.

And what would be the result of failing to discipline the Clerk? Our experience teaches us that it lends an aura of credibility to the tale. This may be a risk that "public officials" must accept when the remarks are made by the ordinary citizen, but when the ordinary citizen is also an employee, there is no reason why the risk should be multiplied to include job insurance for the employee who has wrecked the business.

2. One of the fundamental defects in appellant's argument is the failure to recognize that the roles of citizen and employee are not necessarily identical. We may all agree with Mr. Justice Schaefer's remarks that,

> "Teachers are not necessarily the best critics in matters of school finance and administration, but they are in closer contact with the actual operation of the schools than anyone else, and the public should not be deprived of their views." *Pickering* v. *Board of Education,* 36 Ill. 2d 568 at 584, 225 N. E. 2d 1 (1967).

However, what Mr. Justice Schaefer fails to point out is that the very closeness of the teacher to the schools requires that he exercise a much greater degree of care when speaking of them than might be required of the ordinary taxpayer. The position which he holds increases the probability that his remarks will be believed. The ability to make

others believe carries with it the capacity to injure those about whom the remarks are directed; and as the capacity to injure increases, the duty to exercise care increases correlatively.

Whether the speech by an employee passes beyond the permissible bounds should be measured by the extent of his duty to exercise care and restraint. This, in turn, depends on all the facts and circumstances of the case. To establish a rule of law that any public employee may show his defiance and hostility and cause his employer substantial injury while all but guaranteeing the wrongdoer his position is not law but license.

A hundred years ago in Nassau County, New York, an elected trustee of a school district who exercised his undoubted right of correcting a teacher employed by the district, but in such a way as to upset the discipline of the schools, was not merely suspended but was actually removed from office.

"In 1851 Elisha Bedell, Trustee of District No. 1, Hempstead, actually disturbed and interrupted the class taught by Mary Augusta Brown. In the presence of the students he 'used angry and abusive language to the teacher, openly countermanded her orders in conducting school and caused the school to be thrown into disorder.' Because of these actions . . . he . . . (was) removed from office by New York State Superintendent of Schools, Christopher Morgan." *Common Schools in Hempstead, North Hempstead and Oyster Bay 1800-1860,* Edward J. Smits, Nassau County Historical Society Journal Vol. XXVII, No. 1, pages 31-32.

If the trustee's opinions had been vented privately it might have been a proper and commendable discharge of his duty and well within his rights. So too with the appellant, Mr. Puentes. It was not the exercise of free speech that was condemned in each case. It was the manner in which that exercise took place. *Accord*: *Swaaley* v. *United States,* 376 F. 2d 857 (U. S. Ct. Cl. 1967), holding that a

defamatory letter addressed to the employer and delivered only to him was not grounds for dismissal. ". . . (I)f he had indiscriminately distributed copies, the issue here would be entirely different". *Id.* at 862. See *Stein* v. *Oshinsky,* 348 F. 2d 99 (2d Cir.), cert. denied, 382 U. S. 957 (1965), where the Court held that the refusal by the School Board to permit voluntary student initiated prayers in school is not a violation of the students' constitutional right to free exercise of religion or free speech. The children would have to content themselves with saying the prayers before nine or after three. Cf. *Kidder* v. *Chellis,* 59 N. H. 473 (1879).

3. The cases cited by the appellant to support his position are not relevant to the issue presented. He has placed great reliance on the recent cases of *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967), and *Garrity* v. *State of New Jersey,* 385 U. S. 493 (1967). He has sought to bring this case within the orbit of other notable decisions such as *Wieman* v. *Updegraff,* 344 U. S. 183 (1952); *Torasco* v. *Watkins,* 367 U. S. 488 (1961); *Slochower* v. *Board of Education,* 350 U. S. 551 (1956).

However, each of these cases involved either the absolute surrender of a constitutional right as an incident to obtaining or retaining public employment or the real threat that public employment could be terminated by the mere advocacy of or advice about abstract ideas. In the case of *Keyishian* v. *Board of Regents, supra,* for example, the statutes in question were unconstitutional because they might easily be construed to prescribe punishment in the absence of any proof of harm. In all of the other cases cited employment was terminated or denied—in the absence of proof of any harm—through the mere exercise of a constitutionally protected right.

In the present case, as in all disciplinary proceedings, it is the presence of provable harm which makes the statute

operative. It is not the exercise of the constitutionally protected right which is punishable. It is the actual harm, if any, which results from its exercise. Even rights protected by the First Amendment are subject to regulation when their exercise threatens society. Cf. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940) (dictum).

4. The cases cited by the appellant and referred to in the preceding section (3) demonstrate yet another weakness in appellant's argument. Public employees suffered all too long under disabilities which were not to be found in private employment. Few if any contracts of employment in the private sector required dismissal for the mere exercise of a constitutional right. All too often, this same requirement was present or implied in contracts of public employment.

The trend of recent cases has been to remove these disabilities so that the "tenured" public employee stands on an equal footing with the contract employee in private employment. What the appellant proposes is not to further equalize the balance but to confer on public employees a special privilege to do infinite harm in any circumstance so long as "actual malice" cannot be proved.

It goes even beyond that, however. Where prior decisions have all been predicated on the theory that the state may not dismiss an employee merely for his thoughts or the exercise of his constitutional rights, the gist of appellant's argument is that the only proper ground for disciplining a public employee is an inquiry into what he knew or did not know before he made the statements. In short, says the appellant, it is the employee's thoughts, not his statements which really count. The argument has come full cycle. The unconstitutional act of the state now becomes the constitutional privilege of its employees.

Such a doctrine is so at variance with the pronouncements of this Court in the past as to strip from appellant's

argument whatever substance or reason it seemed at first to possess.

5. There is no substance whatsoever to appellant's argument that he was acting for and on behalf of a union to safeguard the proper interests of all employees. The findings of the Board of Education clearly indicate the "make weight" nature of this contention (Appellant's App. pp. 32-35 and p. 36).

6. Even were we to assume that there was some substance to appellant's argument and that "actual malice" is the true test to be employed in disciplinary proceedings of this type, there would be every reason to conclude from the facts adduced that the appellant either knew that certain statements were false or that he showed a reckless disregard of whether they were true or false.

We must remember that this case was tried prior to the decision in *New York Times Co.* v. *Sullivan, supra.* At the time no such findings were thought to be necessary. However, the Board heard evidence on every point in the letter. Their findings on every point were detailed. Certain accusations were false. Perhaps Mr. Puentes was unaware of their falsity; but in that event, the truth could easily have been ascertained by inquiries made of the principal or the Superintendent or both. No such inquiries were made. As this Court said only a few months ago in *Curtis Publishing Co.* v. *Butts* and *The Associated Press* v. *Walker,* 388 U. S. 130, 87 S. Ct. 1975, 1993 (1967):

> "Elementary precautions were nevertheless ignored. The . . . Post knew that Burnett had been placed on probation in connection with bad check charges, but proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett's notes were not even viewed by any of the magazine's personnel prior to publication."

Even a cursory glance at the facts in this case reveals that there is very little, if any, difference between the actions taken by the Saturday Evening Post and the appellant, Robert Puentes.

CONCLUSION

We respectfully submit, therefore, that the appellant presents no substantial question for the decision of this Court, and that the appeal should be dismissed.

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